

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BILLY LEE NICKSON,

Defendant-Appellant.

UNPUBLISHED

October 3, 2006

No. 262288

Wayne Circuit Court

LC No. 04-012898-01

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317. Pursuant to MCL 769.12, defendant was sentenced as a fourth habitual offender to a term of 30 to 50 years in prison. He appeals as of right. We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Defendant and the victim lived together in Detroit. On the morning of December 12, 2004, they had an argument. Defendant struck the victim with a large toy. In response, the victim allegedly obtained a knife. Defendant took the knife from the victim and stabbed her with it, causing her death. Defendant thereafter called 911 and told the operator what had happened, including the fact that he had stabbed and killed the victim. He then surrendered to the police, who had been dispatched to the scene of the incident. Defendant told the police that he “did it.”

Defendant was questioned by an investigator at the Detroit Police Department. After being given his *Miranda*¹ warnings and waiving them, defendant told the investigator that he had killed the victim. He stated that he had hit the victim with a toy car, and that the victim then got a knife. Defendant stated that he took the knife from the victim and stabbed her in the abdomen.

The trial court instructed the jury on second-degree murder, voluntary manslaughter, and self-defense, using the standard criminal jury instructions. Defendant did not object to the instructions.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

On appeal defendant raises two issues. First, defendant argues that the trial court erroneously instructed the jury on the state of mind required to support a conviction for second-degree murder, thereby shifting the burden away from the prosecution and creating a presumption of guilt. Defendant also argues that the court abused its discretion in admitting the 911 tape recording over his objection.²

Defendant's first argument, that the trial court erroneously instructed the jury, is not preserved because defendant failed to make a timely objection. *People v Gonzalez*, 468 Mich 636, 642; 664 NW2d 159 (2003). We review unpreserved claims for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (2000); *People v Matuszak*, 263 Mich App 42, 47-48; 687 NW2d 342 (2004).

Defense counsel conceded that the prosecution had proven two of the three elements of second-degree murder. Specifically, with respect to the state-of-mind element, counsel stated:

Either intent to kill or the intent to do great bodily harm with knowledge that death or great bodily harm is the result of that action. Has that element been proven? Yeah, sure. You don't stick somebody in the stomach and not intend to do great bodily harm, at least. I will concede that element.

Jury instructions are reviewed in their entirety to determine if there was reversible error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if the instructions are imperfect, there is no error requiring reversal if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* The instructions must clearly present the case to the jury and instruct on the applicable law. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003).

To convict a defendant of second-degree murder, the prosecution must prove that the defendant intended to kill or to do great bodily harm, or that the defendant acted with willful and wanton disregard of the likelihood that the natural tendency of his actions would be to cause death or great bodily harm. *People v Biggs*, 202 Mich App 450, 453; 509 NW2d 803 (1993). The standard criminal jury instructions used here, CJI2d 16.21, allowed the jury to infer intent from the weapon used, the wounds inflicted, the defendant's acts or words, or any other circumstances surrounding the incident. Taken as a whole, these instructions fairly presented the applicable law to the jury. See *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999) (intent to kill may be proved by inference from any facts in evidence, and minimal circumstantial evidence is sufficient to prove such intent). Moreover, this Court has upheld the use of similar instructions regarding intent in the past. *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1995). No error occurred in the use of the standard jury instruction on the intent element of second-degree murder.

Further, the jury heard defendant's own statements that he had stabbed and killed the victim. Those statements were made to the 911 operator, a police officer who responded to the

² This second argument is raised in defendant's supplemental appeal brief, which was filed *in propria persona*.

scene, and the investigating officer who later questioned defendant. The jury could have easily decided that the intent element had been proven by defendant's own words. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence.'" *Carines, supra* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993). The overwhelming evidence in the present case was sufficient to show that any error did not result in the conviction of an actually innocent defendant.

Defendant next argues that the trial court abused its discretion in admitting the 911 tape over his objection. He puts forth two bases for his argument, including an alleged violation of MCR 6.201, and unfair surprise at trial.

The admission of evidence lies within the trial court's discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). The decision to admit or exclude evidence will not be disturbed absent an abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant first relies on the court rule regarding discovery in criminal cases as a basis for his claim of error. MCR 6.201 requires requests for discovery and allows the other party time to respond to such requests. Defendant contends that the prosecution violated MCR 6.201(F). However, there is no indication in the lower court record that defendant made a request for discovery. There is also no indication in the record that trial counsel made such a request for discovery. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Issues that are insufficiently briefed are abandoned on appeal. *People v VanTubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002).

Defendant also claims unfair surprise in the admission of the 911 tape. Considering that defendant made the 911 call himself, it may be assumed that he knew of the existence of evidence of the call. Counsel admitted that he knew the 911 call was made by defendant, but claimed he was unaware of any tape recording of the call. The trial court found no unfair surprise given that both defendant and his attorney knew of the 911 call. An abuse of discretion occurs only when there is no justification or excuse for the ruling. The trial court's decision to admit the tape was based on a valid reason and represented a principled outcome; it was not an abuse of discretion. *People v McSwain*, 259 Mich App 654, 684-685; 676 NW2d 236 (2003).

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper